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September 18, 2012

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: NOTICE OF EX PARTE PRESENTATION
WT DOCKET NO. 10-4

Dear Ms. Dortch:

On September 12, 2012, Joe Banos of Wilson Electronics, Inc., Edmond Thomas of Hogan Lovells US LLP, and the undersigned met with David Goldman, Legal Advisor to Commissioner Rosenworcel, to discuss matters pertaining to the above-referenced rulemaking proceeding.

During the meeting, the Wilson representatives informed Mr. Goldman of the successful conclusion of Wilson's joint efforts with Verizon Wireless to fashion technical specifications for signal boosters that will ensure that the devices can be manufactured, certified, marketed, and operated by consumers without harm to wireless networks.

Mr. Goldman was advised of Wilson's support of the Commission's proposal to authorize the use of properly-certified consumer signal boosters by Part 95 rules, pursuant to 47 U.S.C. § 307(e). He was also advised that Wilson opposed proposals that the Commission impose a requirement that carriers must consent to the operation of signal boosters on their networks that have already been certified as meeting industry-consensus, Commission-approved technical standards that safeguard network operations. However, if such a carrier-consent requirement is to be imposed, the Wilson representatives suggested to Mr. Goldman that the Commission also explicitly prohibit carriers from unreasonably withholding their consent to the use of signal boosters that have been certified as meeting the Commission's technical requirements.

At the conclusion of the meeting, Mr. Goldman was given a handout, a copy of which is attached hereto.

This letter is being filed electronically pursuant to § 1.1206 of the rules. Should any questions arise with regard to this matter, please direct them to me.

Very truly yours,

Russell D. Lukas

Attachment

cc: David Goldman

WILSON ELECTRONICS, INC.
WT DOCKET NO. 10-4
September 12, 2012

I. THE RULES CURRENTLY DO NOT REQUIRE A SUSCRIBER IN GOOD STANDING TO OBTAIN CARRIER CONSENT TO USE A PROPERLY CERTIFIED CONSUMER SIGNAL BOOSTER

- Not all radio transmitting equipment requires a Commission authorization or license to operate. *See* 47 C.F.R. §§ 15.1-15.717. The Commission first exercised its rulemaking authority in 1938 to provide for the unlicensed operation of low power radio devices. *See Revision of Part 15 of the Rules Regarding Ultra-Wideband Transmission Systems,* 19 FCC Rcd 24558, 24590 (2004) ("*Part 15 Revision*").

- The operation of radio transmitting equipment without a Commission authorization is a violation of § 301 of the Act, only if the operator was required by the Commission's rules to obtain an authorization prior to operating the equipment. However, no rule can be found that requires a CMRS subscriber to obtain a Commission authorization to use or operate a properly-certified consumer signal booster.

- Stations in the Wireless Radio Services "must be used and operated only in accordance with the rules applicable to their particular service … and with a valid authorization granted by the Commission under the provisions of this [Subpart F]." 47 C.F.R. § 1.903(a).

- "Authority for subscribers to operate mobile or fixed stations in the Wireless Radio Services … is included in the authorization held by the licensee providing service to them. Subscribers are not required to apply for, and the Commission does not accept, applications from subscribers for individual mobile or fixed station authorizations in the Wireless Radio Services." *Id.* § 1.903(c). *See id.* § 22.3(b).

- No rule or legally-enforceable Commission opinion, order, interpretation, or formal policy statement exists that explicitly prohibits subscribers from using properly-certified, non-interfering consumer signal boosters without the consent of their licensed service providers.

- On May 12, 2008, the Enforcement Bureau issued a NALF to Digital Antenna for failing to respond fully to the Bureau's directive to provide information related to its products. *See Digital Antenna, Inc.*, 23 FCC Rcd 7600, 7602 (Spectrum Enf. Div. 2008). The background section of the NALF included the statement that the Bureau's notice of inquiry ("NOI") informed Digital Antenna that signal boosters may only be used by end user customers with the express authorization of the licensed provider. *See id.* at 7601.

- On May 14, 2008, I sent an email to the Bureau informing it that I had just researched the issue and concluded that signal boosters could be used without the authorization of the cellular licensee. Having issued a legal opinion letter to that effect, I asked the Bureau how I could obtain a copy of its NOI to Digital Antenna. The Bureau informed me that I would have to file an FOIA request to obtain the NOI.

- On May 19, 2008, I sent an email to the Bureau in which I explained that having issued an opinion letter, it was "extremely important for me to know the rule section or published decision that prohibits the use of cellular booster by an end user customer absent express authorization of the licensee." I received a telephone call from the Bureau confirming that no rule or published case prohibits the use of a cellular booster by an end user customer absent express authorization of the cellular licensee.

II. THE COMMISSION HAS THE POWER UNDER §§ 4(i) AND 303(r) OF THE ACT TO AUTHORIZE THE USE OF PROPERLY-CERTIFIED SIGNAL BOOSTERS ON EXCLUSIVE-USE CMRS SPECTRUM

- The term "license" is defined as "that instrument of authorization required by [the Act] *or the rules and regulations of the Commission* made pursuant to [the Act], for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission." 47 U.S.C. § 153(49) (emphasis added).

- The Act does not mandate how the Commission must license the use and operation of "any apparatus for the transmission of energy or communications or signals by radio" under § 301. 47 U.S.C. § 301. The statutory definition of "license" recognizes the Commission's rulemaking authority to adopt such rules and regulations that are necessary to execute its duty to issue licenses under § 301. *See* 47 U.S.C. §§ 154(i), 303(r).

- The Commission has exercised its rulemaking authority to develop diverse licensing schemes, including "licensing-by-rule" under § 307(e), site-specific licensing, and blanket and wide-area licensing. *See Part 15 Revision*, 9 FCC Rcd at 24593.

- The Commission exercised its rulemaking authority under §§ 4(i) and 303(r) in 1980, when it ceased licensing individual mobile units under Part 22 in favor of the current CMRS blanket licensing regulatory scheme. *See Amendment of Part 22 of the Rules to Modify Individual Licensing Procedures in the Public Mobile Services,* 77 F.C.C. 2d 84, 85-86 (1980). It is under that scheme that subscribers operate mobile or fixed stations under Part 22 today, including mobile and fixed signal boosters. *See* 47 C.F.R. §§ 22.3(b), 22.165, 22.377, 22.383, 22.517, 22.927.

- The Commission also exercised its authority under §§ 4(i) and 303(r) when it chose to employ blanket licensing with respect to the ship users' units of automated maritime telecommunications systems, *see Amendment of Parts 2 and 80 of the Rules Applicable to Automated Maritime Telecommunications Systems*, 6 FCC Rcd 437, 440 (1991), and subscriber units in the rural radio service for which the ERP did not exceed 60 watts. *See Revision and Update of Part 22 of the Public Mobile Radio Services Rules,* 95 F.C.C. 2d 769, 828-29, 832-33 (1983).

III. THE COMMISSION HAS THE AUTHORITY UNDER § 307(e) OF THE ACT TO LICENSE THE USE OF PROPERLY-CERTIFIED SIGNAL BOOSTERS ON EXCLUSIVE-USE CMRS SPECTRUM

- The Commission held that it had the authority under § 307(e) to license the operation of consumer signal boosters under new Part 95 rules. *See Amendment of Parts 1, 2, 23, 24, 27, 90 and 95 of the Rules to Improve Wireless Coverage Through the Use of Signal Boosters*, 26 FCC Rcd 5490, 5502 (2011) ("*NPRM*"). When it explained its tentative conclusion that authorizing the operation of "properly certified signal boosters" by rule under § 307(e) would best serve the public interest, the Commission was "mindful" that it was proposing to authorize the "operation of signal boosters on licensed spectrum." *Id.*

- The Act does not define the term "citizens band radio service." To the contrary, § 307(e)(3) provides that the term shall have the meaning given it "by the Commission by rule." 47 U.S.C. § 307(e)(3). That provision gives the Commission virtually unbridled rulemaking authority to include a "signal booster radio service" among the "Citizens Band Radio Services" as defined by § 95.401 of its rules.

- The Commission has interpreted § 307(e)(1) broadly to provide "that upon determination of the Commission that an authorization serves the public interest ... the Commission may by rule authorize the operation of radio stations without individual licenses in the citizens band radio service." *Amendment of Parts 2 and 95 of the Rules to Establish a Medical Implant Communications Service in the 402-405 MHz Band*, 14 FCC Rcd 21040, 21044 n.30 (1999).

- MetroPCS has made the frivolous argument that the Commission's authority to authorize unlicensed operations in the citizens band radio service under § 307(e) is limited to what Congress understood the service to be in 1982 when it enacted the provision. The Commission has expanded the definition of "Citizens Band Radio Services" to include six distinct services that bear no resemblance to traditional CB Radio Service. *Compare* 47 C.F.R. § 95.401(a) *with id.* §§ 95.401(b)-(g).

- Both under *Chevron* and the plain meaning of § 307(e)(3), the Commission has been delegated the authority to fill the gap in subsection (e)(3) by defining the term "citizens band radio service" in a reasonable fashion. Considering that it may authorize the operation of radio stations without individual licenses by rule under §§ 4(i) and 303(r), the Commission would be well within its authority if it made the reasonable policy choice that, to include a "Signal Booster Radio Service" as among the "Citizens Band Radio Services" under § 95.401 of its rules.

IV. THE COMMISSION HAS TITLE III AUTHORITY TO AUTHORIZE THE OPERATION OF CONSUMER SIGNAL BOOSTERS ON EXCLUSIVE-USE CMRS SPECTRUM

- The Commission has the authority under Title III of the Act to subordinate a licensee's right to use licensed spectrum to the right of its subscribers to use non-interfering signal boosters to maximize the benefits of the wireless service they pay to receive.

- Congress did not diminish the Commission's authority to regulate when it authorized spectrum auctions in 1997. *See* 47 U.S.C. § 309(j)(6)(C). By law, auctioned licenses do not convey an ownership interest in the licensed spectrum. *See id.* § 301. In fact, auctioned licenses do not convey any rights that differ from the rights that apply to licenses that were not purchased at a market price. *See id.* § 309(j)(6)(D). Nor do spectrum purchasers acquire the exclusive right to use auctioned spectrum. *See id.* §§ 309(h)(3), 606. The Commission proved that in

2007, when it required CMRS carriers to provide roaming services to other carriers in order to "safeguard wireless consumers' reasonable expectations of receiving seamless nationwide commercial mobile telephony services through roaming." *Reexamination of Roaming Obligations of CMRS Providers*, 22 FCC Rcd 15817, 15819 (2007) ("*Automatic Roaming Order*").

▪ The day after it released its *NPRM*, the Commission reaffirmed that "[s]pectrum is a public resource," and that Title III of the Act provided it "with broad authority to manage spectrum, including allocating and assigning radio spectrum for spectrum based services and modifying spectrum usage conditions in the public interest." *Reexamination of Roaming Obligations of CMRS Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 5411, 5440 (2011) ("*Data Roaming Order*"). Citing § 301 of the Act, it also reaffirmed that the issuance of one of its licenses "does not convey any ownership or property interests in the spectrum and does not provide the licensee with any rights that can override the Commission's proper exercise of its regulatory power over the spectrum." *Id.* Moreover, it recognized that § 303 empowered it to, *inter alia*, establish operational obligations for licensees, and that § 316 authorized it to adopt new conditions on existing licenses. *See id.* at 5440-41. The Commission found that its authority "to manage spectrum and establish and modify license and spectrum usage conditions," *id.* at 5412, allowed it to promulgate a data roaming rule in order to "allow consumers with mobile data plans to remain connected when they travel outside their own provider's network coverage areas by using another provider's network." *Id.* at 5411.

▪ In its *Data Roaming Order*, the Commission exercised its Title III authority to require a carrier to allow consumers of another provider's broadband service to use the spectrum it purchased at "market price" so they can remain connected when they travel outside their provider's network coverage. The Commission may exercise the same authority to require a carrier to allow its own subscribers to operate properly-designed signal boosters on its licensed spectrum so that they can remain connected when they travel within its network coverage area.

V. AN ARBITRARY, UNREASONABLE OR ANTICOMPETITIVE REFUSAL TO PERMIT THE USE OF CERTIFIED SIGNAL BOOSTERS WOULD VIOLATE §§ 201 AND 202(a) OF THE ACT

▪ The promulgation of a Part 20 rule that codifies technical and operational requirements for consumer signal boosters, or the adoption of a technical safe

harbor for such devices, would constitute a Commission finding that the operation of compliant boosters by consumers presumably serves the public interest.

- The Commission should formally establish a rebuttable presumption that a CMRS subscriber's request to use a compliant signal booster is reasonable, which would effectively shift the burden of proof to the CMRS licensee to demonstrate that the operation of the booster would cause harmful interference to its network. The Commission established such a presumption when it adopted its automatic roaming rule. *See Automatic Roaming Order*, 22 FCC Rcd at 15831; *Reexamination of Roaming Obligations of CMRS Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd 4181, 4199-4201 (2010). *See also* 47 C.F.R. § 20.12(d).

- CMRS licensees are subject to §§ 201 and 202 of the Act. *See* 47 C.F.R. § 20.15(a).

- CMRS providers are also subject to the provisions of §§ 206-209 of the Act, which make them liable for damages caused by their violations of the Act. *See id.* Consequently, if a CMRS carrier's refusal to permit the use of a certified signal booster is found to deny a reasonable request for service in violation of § 201(a), or to be an unjust or unreasonable practice under § 201(b), or to be an unjust or unreasonable discrimination in practices under § 202(a), a party claiming to be damaged by a CMRS carrier's violation of § 201 or § 202(a) could bring a civil action for damages in federal court under § 206 or file a complaint for damages with the Commission under § 208, but not both. *See* 47 U.S.C. § 207.

- The Commission has applied the principles of *Hush-A-Phone Corp. v. United States,* 238 F.2d 266 (D.C. Cir. 1956) and *Carterfone*, 13 F.C.C. 2d 149, *reconsideration denied,* 14 F.C.C. 2d 571 (1968) to CMRS providers. *See Radio Telephone Industries, Inc. v. Mahaffey Message Relay, Inc.*, 61 F.C.C. 2d 212, 214 & n.9 (1976). Accordingly, CMRS providers are subject to the Commission's jurisdiction over "any charge, practice, classification or regulation" of a CMRS provider that affects "a subscriber's right to make beneficial use of his mobile telephone in interstate communications." *Id.* at 214. Clearly, a CMRS carrier's practice of unjustifiably refusing to consent to a subscriber's use of a compliant signal booster would adversely affect the subscriber's right to make beneficial use of CMRS and, therefore, constitute an unjust or unreasonable practice in violation of § 201(b). Such refusal may also violate § 201(a) by denying a reasonable request to use a customer-provided signal booster. *See id.* at 216-17.

- CMRS providers all sell and lease radio devices that are capable of interstate communications. Thus, their trade is in interstate commerce within the meaning of § 313 of the Act. *See Memphis Radio Telephone Co., Inc. v. Mahaffey Message Relay, Inc.*, 49 F.C.C. 2d 258, 259 (1974). Accordingly, CMRS providers are subject to the Commission's jurisdiction to determine whether they have engaged in conduct to prevent equipment manufacturers from competing in interstate trade and commerce in radio devices. *See id.* at 258-59. A carrier that consents to the use of signal boosters that it sells or leases directly to its subscribers, but refuses to consent to the use of subscriber-provided compliant boosters, could be found to have engaged in unreasonable, discriminatory and anticompetitive practices in violation of §§ 201(b) and 202(a).